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Viewing cable 09KUALALUMPUR529, ANWAR IBRAHIM'S SODOMY TRIAL II - A PRIMER

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C O N F I D E N T I A L SECTION 01 OF 07 KUALA LUMPUR 000529

SIPDIS

FOR EAP/MTS

Classified By: POLITICAL COUNSELOR MARK D. CLARK, REASON 1.4 (B AND D).

Summary and Comment

¶1. (C) Malaysian Opposition leader Anwar Ibrahim will go on trial beginning July 8 on charges of sodomy -- a criminal offense in Malaysia -- with a former aide. Anwar was previously tried and convicted of sodomy in 2000 in a heavily manipulated trial that the U.S. concluded "was marred by deep flaws in the judicial process." The verdict was overturned on appeal in 2004. Senior Malaysian authorities were very aggressive in handling the present case during the initial period of June-September 2008, but, coinciding with the passing of Anwar's deadline to bring down the government through Parliamentary cross-overs, have since taken a more measured "rule-of-law" approach in public. Authorities have not taken all the legal and extra-legal measures available to them, for example, to challenge Anwar's bail provisions or resolve an earlier impasse regarding the court venue. Anwar's conviction in this trial, which may last many months, could end his political career; the judge would decide whether Anwar would remain free pending an appeal. This cable provides a primer for the Department's reference, including background on the 2000 conviction and the present case, a synopsis of the specific legal charges and penalties, a summary of likely evidence to be presented in court, and three possible scenarios for the trial.

¶2. (C) Comment: The issue of the specific actions between Anwar and his aide will play out in court and, we suspect, in a very sensationalistic fashion. The facts surrounding the case, however, make a compelling argument that the government's prosecution of the case is foremost a political act against the Opposition leader. Whether the incident in question was wholly concocted or has some basis in fact, the case is not part of a morals campaign or a normal criminal matter and has been the subject of extensive political interference and manipulation. As one consequence, much of the Malaysian public remains deeply sceptical about the government's prosecution of Anwar Ibrahim. Anwar's flawed trials in 1998-2000 produced a public uproar and attracted international condemnation; in today's information-intensive environment, such effects may be exacerbated depending on events in court. Embassy will provide draft press guidance for the Department's consideration prior to the July 8 trial date. End Summary and Comment.

Sodomy Case I, 1998-2000

¶3. (SBU) Under the government of former Prime Minister Mahathir, Anwar Ibrahim was charged and convicted of sodomy (and abuse of power) in a sensationalistic trials in 1998-2000, directed and heavily manipulated by Mahathir against his former deputy. Anwar was charged with sodomizing his wife's driver. During his pre-trial detention, Anwar was beaten by the then Inspector General of Police. The High Court convicted Anwar of sodomy in August 2000 and sentenced him to nine years imprisonment. The U.S. expressed deep concern with the first sodomy trial, noting "that the trial and (Anwar's) resulting conviction and nine-year jail sentence were marred by deep flaws in the judicial process." After Mahathir stepped down in favor of Abdullah Badawi, the Federal Court overturned the conviction in September 2004 and released Anwar from prison (Anwar's separate conviction for abuse of power remained in place). The Federal Court found there were "many unusual things that happened regarding the arrest and confession" of certain prosecution witnesses, including the fact that Anwar's driver stated that he was paid to make the allegations against Anwar. In an unusual move and possible political compromise, the Federal Court judges included in their judgment the conclusion that there

was evidence to confirm "the appellants were involved in homosexual activities," but added that the prosecution failed to prove the alleged offenses beyond reasonable doubt. Because Anwar's conviction on the separate charge of abuse of power was not overturned, he was barred from political office until April 2008.

Sodomy Case II, 2008

¶4. (SBU) Less than four months after Anwar Ibrahim's People's Justice Party (PKR) and its opposition partners made significant advances in the March 2008 national elections, and three months after Anwar became eligible for political office, an aide to Anwar, Mohd Saiful Bukhari Azlan, filed a police report on June 28, 2008, alleging that he had been forcibly sodomized by Anwar on several occasions. The following day, Anwar took refuge in the Turkish ambassador's residence, claiming that he feared a repetition of his 1998 arrest and for his personal safety. He remained with the Turkish ambassador for only one day, departing after public assurances of his safety from the Foreign Minister and Home Minister. In the midst of a highly charged political atmosphere, which included Anwar's claims that he could bring down the government through Parliamentary defections by September 16, 2008, and new allegations linking then DPM Najib with the Altantuya murder case, the police investigation proceeded. It came to light that Saiful had had contact with the office of then DPM Najib prior to working with Anwar, and more significantly Saiful had met with Najib (and allegedly his wife Rosmah) at Najib's home just prior to filing his police complaint. Najib first denied publicly he had any connection with the case, and then acknowledged meeting Saiful, an admission that preempted internet reports about to be released by blogger Raja Petra (who is now a fugitive from sedition charges).

¶5. (SBU) As authorities made known their intention to arrest and charge Anwar for sodomy, Anwar's lawyers arranged for his voluntary appearance before police for questioning and charging. Contrary to the agreement, on July 16, police in commando-style outfits waylaid Anwar's convoy en route to the police station and arrested him on the street. Police questioned Anwar, took him to a hospital to provide a DNA sample (which Anwar refused, citing lawyers' advice and fear of "manipulation"), and held him overnight. Anwar was released on police bail by a magistrate on July 17.

The Charges

¶6. (SBU) On August 7, 2008, prosecutors charged Anwar Ibrahim before a Sessions Court under Section 377B of the Penal Code, which reads: "Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years and shall be liable to whipping." Section 377A of the Penal Code defines "carnal intercourse against the order of nature" as including sodomy. Prosecutors specifically charged Anwar with the sodomizing of Saiful Bukhari Azlan at a Kuala Lumpur condominium (owned by Anwar's friend) on June 26, 2008. Although Saiful originally claimed he was forcibly sodomized on several occasions, the prosecutors chose not to pursue charges against Anwar under a separate Penal Code section (377C), which pertains to non-consensual sodomy (with a higher burden of proof), and also to focus on only one alleged incident. It is important to note that under Malaysia's legal system, prosecutors may amend the charges during the course of the trial. Saiful himself does not face charges for the alleged acts. The Court ordered Anwar to remain free on a personal bond of US \$5,700 RM 20,000 and did not impose other restrictions (for example, Anwar has been free to travel abroad and has done so on many occasions since August 2008). The government did not attempt to dispute or revoke the bail provisions.

Wrangle and Delay over Court Venue

¶7. (SBU) Following Anwar's formal charging, and with Anwar's 9/16 deadline looming in the background, prosecutors quickly moved to transfer the case from the Sessions Court to the High Court. The prosecution argued on September 10, 2008, that such an important case with possibly complicated legal issues should be dealt with at the High Court and produced a certificate signed by the Attorney General to move the case, which under normal circumstances automatically results in a transfer. However, Anwar's lawyers objected to the transfer out of concern that the more politicized High Court level would result in a pro-prosecution judge hearing the case, as happened during the first sodomy trial in 1999-2000. In November 2008, independent-minded Sessions Court judge Komathy Suppiah rejected the certificate of transfer, noting that Attorney General Gani Patail faced allegations of evidence tampering in Anwar's 1998 case and the transfer order signed by the AG would "undermine the public perception of the judiciary."

¶8. (C) Judge Komathy was overruled in March 2009 by High Court judge Mohamad Zabidin Md Diah who decided the Sessions Court has no authority to refuse the Attorney General's transfer order; Zabidin himself was then assigned to preside over the sodomy trial. Anwar's lawyers filed an appeal against the transfer; the Court of Appeals only began to hear the appeal on June 30; based on precedent, Anwar's camp admits the appeal has little chance of success. Zabidin initially attempted to schedule the trial to begin in May 2009; defense lawyers argued they needed more time and hoped their appeal would be heard prior to the trial. (Note: The High Court often takes one to two years before setting trial dates in normal criminal cases. End Note.) Zabidin subsequently set the trial to begin on July 1. Anwar's lawyers filed an application to compel the prosecution to provide them with full documentation and evidence that will be introduced at the trial, which the prosecution has thus far failed to do in apparent violation of the Criminal Procedure Code. With the hearing on the disclosure of evidence set for July 1 (now pushed back to July 3), Judge Zabidin postponed the trial start to July 8. The judge originally specified a three-week duration for the trial, but lawyers assume that the trial will take many months to conclude.

The High Court Judge

¶9. (C) High Court Judge Mohamad Zabidin Md Diah is a lawyer by training. After private law practice, he joined the judicial service as a Sessions Court judge and was elevated to judicial commissioner in 2004. After two years on contract, Zabidin was promoted to become a permanent High Court judge in 2006. Zabidin is not a well-known judge and is not associated with high profile or controversial judgments, according to our senior legal contacts. Anwar's lawyers allege that Zabidin is beholden to the government and will favor the prosecution; the judge's unusual rush to bring the case to trial is viewed by the defense as an early indication of his bias.

Government Switches Gears

¶10. (C) Senior government and UMNO party officials adopted a very aggressive public and private approach to the Anwar case during the June-September 2008 period. This included frequent, prejudicial statements in public, and strong claims in private to other politicians and diplomats regarding Anwar's guilt. This intensive phase encompassed the initial news of the allegations and Anwar's formal charging, but also Anwar's own aggressive political posturing and claims that he could bring down the government by September 2008 through Parliamentary crossovers. After Anwar's deadline passed in September, and after resolution of the UMNO leadership battle in favor of Najib's succession in October 2008, we observed a definite toning down of the Government's approach, and a shifting to a lower gear. For example, we did not hear

reports of government intervention to quickly resolve the matter of the court venue, which effectively delayed the prosecution by some seven months. Anwar's bail provisions remained in place and unchallenged. Public statements by senior government officials, outside of by-election campaigns, became infrequent. This toned down approach has continued through the present; it would fit within a hypothetical decision to demonstrate that the trial is a law enforcement matter, rather than a political battle. Regardless, it is clear that the government has not taken all the legal and extra-legal steps against Anwar that it could have since September 2008.

GOM Confidence: Waning or Recalculating?

¶11. (C) Many of our government and UMNO contacts have insisted to us, emphatically so in the early months of the case, that the evidence against Anwar is very conclusive, often hinting at video footage and physical evidence like DNA (see below). Recently, some contacts sympathetic to Anwar but not part of his team claimed the government over time had become less certain it had sufficient evidence to convict Anwar. According to one unconfirmed account, in June several key aides to PM Najib advised him to drop the case against Anwar because the evidence was not strong enough for an easy conviction and the political cost of forcing through a guilty verdict would be too high. It is also possible that the toned down rhetoric from the government has been misinterpreted as uncertainty on the authorities' part.

Evidence at the Trial

¶12. (C) Based on available information, we believe the following evidentiary aspects will feature in Anwar's trial:

Saiful's complaint: The testimony of Saiful is central to the government's case, and he is expected to take the stand. Saiful has continued to assert that he was forcibly sodomized, although the charges under Section 377B do not require proof of a non-consensual act; given his youth (age 23) and physical size, Saiful will need to explain specific circumstances of the incident to support his assertion of rape.

Medical reports: As publicly revealed by defense lawyers, Saiful underwent two medical examinations on June 28, 2008, just prior to lodging a police report. The first examination by a Burmese doctor at a local hospital concluded there was "no conclusive clinical findings" suggestive of sodomy, and the doctor recommended he be examined at a government hospital in line with police procedures in such cases. (Note: The Burmese doctor briefly left Malaysia after being held for questioning by police. End Note.) The second examination at the police-approved government hospital also failed to uncover medical evidence of sodomy, according to copies of hospital reports released by the defense.

DNA: The defense team believes prosecutors will introduce DNA evidence, based on DNA samples held by the police since 1998, and are preparing expert witnesses. The government's hurried passage in Parliament of a DNA bill, approved by the lower house on June 23, is widely seen as tied to the Anwar trial and will permit the government to utilize the 11-year old samples. The defense could claim the samples were planted, as is widely believed to be the case in Anwar's earlier prosecution.

Anwar's alibi: Anwar's lawyers claim that five persons will testify that Anwar was with them at the time of the alleged incident. They also claim that police attempted but failed to intimidate some of these defense witnesses to change their accounts.

CCTV: The prosecution may use CCTV footage from the condominium where the alleged incident took place to confirm Anwar's presence at a specific date and time.

Character witnesses: As happened in the 1999 case, it is very possible that prosecutors introduce witnesses to attack Anwar's character and actions aside from the alleged 2008 sodomy incident. There are unconfirmed reports that the prosecution will call 30 witnesses to the stand.

Defense witnesses (PM Najib and wife Rosmah?): In an effort to demonstrate the political motivation in the government's case, defense lawyers could call PM Najib, his wife Rosmah, and other senior officials such as Najib's aide Khairil Anas Yusof who appear connected to the case (Najib and Rosmah because they met Saiful and discussed his reporting to the police). While this will make for momentary drama, we expect the judge to disallow such moves.

Bail and other Conditions during the Trial

¶13. (C) Anwar's legal team has expressed concern that the prosecution may apply to revoke the personal bond that allows Anwar to be free pending the trial or seek to impose other conditions, such as impounding his passport or restricting his movement to within Kuala Lumpur. The lawyers acknowledge that there is not a strong precedent for overturning the existing bail decision. In several recent politically-charged court cases, however, Malaysian judges have ignored precedent decisions. (Note: We have no information on the prosecution's intentions in this matter. End Note.)

What if Anwar is Convicted?

¶14. (C) Most observers conclude that a conviction in Anwar's case, one upheld on appeal, would essentially end Anwar's political career given the legal penalties and Anwar's age (62). According to the Federal Constitution, a member of Parliament will be disqualified from holding his seat if he is convicted of an offense and sentenced to imprisonment for a term of not less than one year or to a fine of not less than US \$570 RM 2,000 and has not received a free pardon. This stipulation comes into effect after all appeals are exhausted (at the Court of Appeals and Federal Court). The constitution also provides that a convicted person can only be active in politics after five years from the date of his release from prison. At age 62, a second conviction could effectively bar Anwar permanently from political life. In the event of a conviction, Anwar will certainly appeal. The judge will decide whether Anwar remains free pending appeal or immediately goes to jail. While officially remaining a Member of Parliament pending the final outcome, he would be unable to operate from prison as the Opposition leader.

Political Interference and Manipulation

¶15. (C) The issue of the alleged actions between Anwar and Saiful will play out in court, and sodomy, even a consensual act, is a crime under Malaysian law. The facts surrounding the case, however, make it clear that the government's prosecution of the case is foremost a political act against the Opposition leader. The Malaysian government does not aggressively prosecute cases of sodomy; we find record of some 55 cases since 1991, or an average of 3 per year. The vast majority of such cases involve adults assaulting minors. Anwar's prosecution is not part of a morals campaign. The GOM does not aggressively target non-heterosexual behavior; if it did so, a recent cabinet minister, senior staff associated with PM Najib and other prominent citizens linked to the government also would find themselves under investigation.

¶16. (C) Aside from the immediate comparison with Anwar's previous prosecution for sodomy, which was grossly manipulated by former Prime Minister Mahathir, the indications of political interference and manipulation in the present case are compelling; much of the information is in

the public realm. Collateral reporting, not addressed here, provides further substantiation.

Najib connection: Keeping in mind that Najib and Anwar remain bitter enemies, it is striking that Najib met personally with the complainant Saiful prior to the police report, and allegedly arranged for Saiful to have intensive contact with senior police officials in the days before he filed the complaint.

Senior officials' involvement: From the very early stages, the senior-most officials in the government, including then PM Abdullah, current PM Najib, cabinet ministers, the AGO and national police chief (the latter two having played important roles in Anwar's 1998-1999 flawed trials) and officials of the ruling UMNO party have been intimately involved in decisions regarding the case, according to Embassy contacts and publicly available sources. Despite the current toned-down government approach, and emphasis that the Anwar trial is a normal law enforcement matter, senior-most executive and UMNO party officials continue such a directing role.

Leakage of information: Senior government leaders provided law enforcement information on the case to leaders of Anwar's coalition partner, the Islamic Party of Malaysia (PAS), in an unsuccessful attempt to split PAS from the opposition. A recent internet report claims that the government has provided some government-directed press editors with a "sneak preview" of evidence against Anwar.

Public statements: From the initial public reports of the complaint against Anwar in June 2008 to Anwar's election to Parliament in August 2008, PM Abdullah and other senior leaders spoke publicly and frequently about Anwar's alleged crime and the need for justice, and the case featured prominently in the parliamentary campaign against Anwar. There have been far fewer statements since September 2008, except during by-election campaigns.

Press: The Government-directed mainstream press, which includes all major dailies and all TV stations, provided extensive coverage of Saiful's allegations while severely limiting reporting on Anwar's response during the heated period of June-August 2008.

Alleged intimidation: The police detained for questioning the doctor who first examined Saiful, causing him to leave Malaysia temporarily out of concern for his safety. Police also pressured the hospital in question to hold a press conference to state that the doctor was not qualified to conduct such an examination, according to our sources. According to defence lawyers, several of their witnesses have been threatened by police in an effort to change their testimony. The Imam for the Federal Territories (including Kuala Lumpur and the administrative capital Putra Jaya) claimed publicly that he was forced to witness an "improper" Islamic oath taken by Saiful; he was subsequently sacked by the Prime Minister's Department.

Customized Legislation, the DNA bill: The government hurriedly prepared a bill on DNA evidence, following shortly after Anwar's refusal to provide a DNA sample at the time of his arrest, which compels suspects to provide samples and allows authorities to utilize previously stored samples in new criminal cases. The government originally introduced the bill in August 2008 and voted it through the lower house only on June 23, 2009; several steps remain before it becomes law.

Public Scepticism

17. (C) In the run-up to Anwar's August 2008 arraignment, public opinion polling conducted by the Merdeka Center, Malaysia's most respected opinion survey group, revealed that a preponderance of Malaysians believed the charges against Anwar were unjust, indicating a deep public scepticism

regarding the government's case. We understand that new polling on this question will be released before the July 8 trial date. Pollsters have informed us that the new data continues to reflect widespread public suspicions. Reportedly, only 15 percent of ethnic Malays and 10 percent of Malaysians overall believe Anwar's prosecution to be justified. Outside of government circles, many Embassy contacts, including those who give credence to rumors of Anwar's personal life, take it as a matter of fact that the government is prosecuting Anwar for political reasons. In a public statement made on June 24, former Bar Council president (and U.S. Woman of Courage awardee in 2009) Ambiga Sreenivasan urged the government to drop the charges against Anwar in order to restore credibility to PM Najib's ruling coalition.

Scenarios

¶18. (C) When viewed as a political matter, a number of potential scenarios for the Anwar prosecution present themselves; below we review three that are most apparent. In these scenarios we assume that Najib will exercise the deciding voice on how and whether to proceed, though he also will need to weigh the opinions of other UMNO ruling party elites.

-- Conviction at all costs: Based on an assessment that Anwar is a threat to UMNO's continued rule at least at the time of the next national elections, Najib and UMNO elites decide that the political costs of prosecuting Anwar are acceptable and pursue the matter aggressively inside and outside the courtroom with the overriding goal of convicting Anwar and removing him permanently from politics. While asserting that this is purely a law enforcement matter, the government exerts political pressure as necessary, accepting reputational risks in the process, and achieves a conviction after months of high-profile drama in the courtroom. The courts hear and reject Anwar's appeals in an expedited manner, well ahead of the next national elections in 2012 or ¶2013. This scenario appeared to be in play during the initial months of the case and in the lead up to Anwar's September 2008 deadline to overturn the ruling coalition's majority; it has been less apparent since then. Recalling the deep personal animosity between Najib and Anwar, and the singular importance of Anwar to the opposition coalition, this scenario remains plausible, even though Anwar's immediate threat to UMNO's rule has passed.

-- Merits of the case, reputational damage: In a second scenario, the government proceeds with the prosecution but refrains from exerting undue pressure to achieve conviction, believing that the evidence presented and/or the court proceedings themselves will sufficiently damage Anwar's reputation and this will outweigh harm to the Najib administration's credibility. Conviction remains the desired outcome, supported by sufficient evidence, but the government accepts some risk of a final verdict of innocence after all appeals are heard. This scenario rests on the assumption of sufficiently clear evidence against Anwar that will swing public opinion in favor of the government even in the event of an eventual acquittal. Absent greater information on the government's evidence against Anwar, it is difficult to judge the prospects for this scenario.

-- Withdrawal: In a third scenario, Najib and UMNO elites decide that the government's case is not strong enough to pursue, entails unacceptable political costs, or is no longer necessary because of the diminished threat from Anwar. The government withdraws the charges prior to the trial start of July 8, or shortly after the trial begins, possibly under conditions of "discharge not amounting to acquittal." (Lawyers tell us that such a discharge in theory would allow the government to reactivate the case at a future time, thus maintaining this as a lever over Anwar.) Najib, confident that he can beat back an opposition challenge in the next election, attributes the original decision to prosecute to the previous administration of Abdullah Badawi and takes

credit for respecting the rule of law in this high profile case involving his determined political nemesis. In contrast to 2008, Najib's currently secure position as UMNO leader and Prime Minister, along with Anwar's diminished threat, make this scenario a political possibility, though some UMNO elites and perhaps Najib himself may not want to give up the opportunity to remove Anwar Ibrahim from politics once and for all.

KEITH